

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 25, 2009

STATE OF TENNESSEE v. RICK ALLEN BOWGER
a/k/a RICK ALLEN BOWSER

Appeal from the Criminal Court for Sullivan County
No. S52,938 R. Jerry Beck, Judge

No. E2008-01252-CCA-R3-CD - Filed April 15, 2009

The defendant, Rick Allen Bowger, also known as Rick Allen Bowser, appeals from the order of the Sullivan County Criminal Court denying alternative sentencing on his guilty-pleaded conviction of domestic assault, a Class A misdemeanor. *See* T.C.A. § 39-13-111 (2006). We affirm the denial of alternative sentencing.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Stephen M. Wallace, District Public Defender; and Joseph F. Harrison, Assistant Public Defender, for the appellant, Rick Allen Bowger, a/k/a Rick Allen Bowser.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kaylin Render Hortenstine, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In the defendant's "best interest" guilty plea submission hearing, the prosecutor revealed that on November 20, 2006, the defendant struck his wife, Daphne Bowser, several times in the face with his fist. The assault resulted in cuts, bruises, and swelling to the victim's face. The prosecutor acknowledged that, in the defendant's preliminary hearing, the victim testified that the defendant "head-butted" her, rather than striking her with his fist.

Following the trial court's acceptance of the defendant's guilty plea to the Class A misdemeanor offense of domestic assault, the court conducted a sentencing hearing to determine the manner of service of the defendant's 11-month, 29-day sentence. The State exhibited to the hearing a presentence report which showed that the defendant, who was then 48 years of age, had been

previously convicted of two charges of public intoxication, four charges of assault, and two charges of domestic violence. The convictions spanned a period from 1989 to 2005.

The defendant's attorney exhibited to the sentencing hearing a medical report which revealed that the defendant, who was wheel-chair bound, suffered from Type II diabetes, hypertension, gastrointestinal reflux disease, peripheral vascular disease, chronic obstructive pulmonary disease with oxygen dependence, deep vein thrombosis, pulmonary embolism, lung disease, and depression. The report also showed that the defendant's right leg had been amputated and that he had undergone coronary and lower-extremity bypass procedures.

The defendant testified in the hearing that, since November 20, 2006, the victim had fallen down stairs, sustaining leg fractures, and, as a result, was an "invalid" who required his care-taking. The defendant testified that he and the victim had experienced no further confrontations since November 20, 2006, and were living "like normal married people do."

The defendant testified that he had undergone 35 surgeries "all over" his body. At the time of sentencing, he was taking fifteen medications daily. He testified that he had been a "chronic pain patient since [he] was 17 years old." He admitted that he had used marijuana as a pain medication, although not in the 30 days prior to the sentencing hearing.

The defendant testified that he had been married five times and that he had been married to the victim for 13 years. He admitted that the victim was also the victim in four of his prior assault or domestic-violence convictions. When asked who had been the victim in his 1994 assault conviction, the defendant testified, "I'm not even sure which wife that was."

Following the testimony, the trial court found that the conviction under review was the "fifth time around on the same woman" and that the defendant was "just mean." The court found that the defendant had been placed on probation four times in the past for assaulting the victim. The court acknowledged the defendant's extreme physical problems and stated that for "[s]omebody that's still . . . functioning in life, he's about the worst you can be." The trial judge commented, "[I]t'll come down to a choice of a hospital or the jail." Ultimately, although the court expressed doubt that the county jail could meet the defendant's needs, it decided to deny probation and to order the defendant to serve his sentence in jail, subject to a 75 percent eligibility for rehabilitative services.

On appeal, the defendant argues that probation or other alternative sentence is proper based upon his physical disability, the inadequacy of the county jail to meet his medical and physical needs, and the absence of any violence perpetrated on the victim by the defendant in the two years that had elapsed since the current offense was committed. In his brief, the defendant argues that neither the interests of society nor those of the defendant could be served by placing him "in jail where he could not receive adequate medical care, most certainly would further damage his precarious health and might even lead to his demise."

In misdemeanor sentencing, the sentencing court is afforded considerable latitude. *See, e.g., State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). Misdemeanor sentences

must be specific and in accordance with the principles, purpose, and goals of the Criminal Sentencing Reform Act of 1989. T.C.A. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than 75 percent of the sentence should be fixed for a misdemeanor offender. *Palmer*, 902 S.W.2d at 393-94. A convicted misdemeanant has no presumption of entitlement to a minimum sentence. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served “in actual confinement” prior to “consideration for work release, furlough, trusty status and related rehabilitative programs.” T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

Given the latitude afforded to trial courts in misdemeanor sentencing, we defer to the trial court’s judgment in this case because the record reflects a basis, within the contours of the sentencing law, for requiring confinement. The defendant has amassed a significant record of assaultive offenses. Five of these, including the current offense, were perpetrated against Daphne Bowser, the defendant’s current wife, and one other assault was apparently perpetrated against a former spouse. In this case, not only was the defendant saddled with a long history of criminal conduct, *see* T.C.A. § 40-35-103(1)(A) (listing a long history of criminal conduct as a basis for ordering confinement), but also much of the prior criminal conduct – and the victim of that conduct – was the same as in the present case.

Accordingly, because the record supports the trial court’s determination, we affirm the judgment of that court.

JAMES CURWOOD WITT, JR., JUDGE